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IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does Rule 60(b) of the Federal Rules of Civil Procedure apply to a case where the petitioner seeks to relitigate in the District Court an issue decided against him by that court, in the absence of any fraud on the court or fundamental miscarriage of justice?

2. Does the successive petition rule apply to an issue previously decided against the petitioner on the ground of procedural default?

3. Can Rule 60(b) be used to revive an issue of law decided against the petitioner in District Court and intentionally omitted from his appeal?

4. Does a Court of Appeals abuse its discretion by refusing to consider a claim intentionally omitted from the appeal and raised for the first time in that court on petition for rehearing, in a habeas case involving no question of guilt of the offense?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to evade Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On February 17, 1986, over 16 years ago, James Lee Jones and Harold Devalle Miller murdered Patrick Daniels and attempted to murder Norma Norman. *Abdur'Rahman* v. *Bell*, 226 F. 3d 696, 699 (CA6 2000). Jones is the petitioner in the present case, now known as Abu-Ali Abdur'Rahman. See *id.*, at 698, n. 1.

> "Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions." *Id.*, at 699.

Petitioner disputes whether he or Miller actually stabbed the victims. Mr. Daniels was stabbed six times in the chest, while begging for his life. *Ibid.* Ms. Norman was stabbed several times in the back, but miraculously survived. *Ibid.* She is not able to tell us which of the intruders did the stabbing, because petitioner, not Miller, taped her eyes shut. See *ibid.* We do know that petitioner personally did the binding and blindfolding that rendered the victims helpless to be slaughtered. See *ibid.* We also know that petitioner placed his gun barrel squarely between Ms. Norman's eyes. *State* v. *Jones*, 789 S. W. 2d 545, 551 (Tenn. 1990). In short, we know to a certainty that Jones/Abdur'Rahman was not just a minor accomplice along

the lines of Sandra Lockett. Cf. *Lockett* v. *Ohio*, 438 U. S. 586, 597 (1978) (plurality opinion).

During the penalty phase, petitioner testified that he stabbed both victims. *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1086 (MD Tenn. 1998).

The conviction and sentence were affirmed on appeal. *State* v. *Jones*, 789 S. W. 2d 545 (1990). Among the claims rejected was a prosecutor misconduct claim regarding inadmissible evidence in the penalty phase of the circumstances of and sentence for Jones' previous murder. See *id.*, at 551-552. This did not amount to reversible error, given that the fact of the prior murder was admissible and undisputed. See *id.*, at 552.

Jones then applied for state post-conviction relief. The trial court denied the petition, and the Court of Criminal Appeals affirmed. *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140 (Feb. 23, 1995). Among the claims rejected on the merits by that court was a claim that the prosecution failed to disclose certain evidence as required by *Brady* v. *Maryland*, 373 U. S. 83 (1963). See *id.*, at *7.

Petitioner then requested leave to appeal to the Tennessee Supreme Court, see 999 F. Supp., at 1078, a form of discretionary review. See *id.*, at 1080. Sixth Circuit precedent in effect at the time had established that omission of a claim from such a petition constitutes a failure to exhaust the claim, leading to default of the claim. See *Silverburg* v. *Evitts*, 993 F. 2d 124, 126 (CA6 1993). Petitioner omitted some of the misconduct claims from the petition. See 999 F. Supp., at 1082.

Petitioner filed a federal habeas petition. The District Court granted summary judgment for respondent on the misconduct claim regarding evidence of the prior murder. See *id.*, at 1079. It also rejected two other *Brady* claims on the merits, finding that mental health records were not material and that lab reports

had, in fact, been given to the defense. *Id.*, at 1089-1090.[2] The District Court denied the misconduct claims not presented to the Tennessee Supreme Court as defaulted. *Id.*, at 1087. The District Court granted relief on the penalty, finding ineffective assistance of counsel. *Id.*, at 1102. The state appealed the latter holding, and petitioner appealed on instruction and guilt-phase issues. See 226 F. 3d, at 700, 709, 711, 713. Petitioner did not appeal the prosecutor misconduct issue. See J. A. 155. The Court of Appeals reversed on the ineffective assistance issue and otherwise affirmed. 226 F. 3d, at 715. This Court denied certiorari. *Abdur'Rahman* v. *Bell*, 534 U. S. __, 151 L. Ed. 2d 295, 122 S. Ct. 386 (2001).

While the certiorari petition was pending, the Tennessee Supreme Court promulgated Rule 39. In response to a suggestion in *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 847 (1999), the new rule states that a petition for discretionary review "shall not be required . . . in order to be deemed to have exhausted all available state remedies . . . ." The state disputes whether this rule reaches back to retroactively cure a claim previously defaulted under the rules of *Silverburg* and *O'Sullivan*. See J. A. 271-273.

Over three months after promulgation of the rule, and following this Court's denial of certiorari, petitioner moved for rehearing in the Court of Appeals and also moved for relief from judgment in the District Court under Rule 60(b) of the Federal Rules of Civil Procedure. See J. A. 152, 158. The District Court treated the motion as a successive habeas petition and transferred the case to the Court of Appeals. J. A. 40-42. The Court of Appeals denied both the petition for rehearing and the motion for leave to file a successive habeas petition. J. A. 39.

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2. Petitioner's extended discussion about the splattering of blood, see Brief for Petitioner 10-19, must be read in light of the fact that the lab report showing no blood on his coat had, in fact, been disclosed to the defense.

SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure do not apply to habeas corpus when their application would be contrary to the statutes or rules specifically governing habeas, or when they are unsuited to the specialized needs of this unique procedure. In particular, Rule 60(b) cannot be used to evade the successive petition rule. Congress has decided when a second round of habeas litigation may be commenced and has established special procedural safeguards for quickly determining which cases qualify for a second round. The purpose of this reform is not to reduce the number of petitions *granted* on a second round, which was never the problem, but to *preclude* the second round and its delay altogether. Broad consideration of Rule 60(b) motions would defeat the purpose of the statute.

The successive petition rule applies to claims denied in the first round on the basis of procedural default, in addition to those denied on the "merits" in the narrow sense. The rule is a modified rule of res judicata. Under the rule of *Angel* v. *Bullington*, any final decision that relief cannot be granted on the claim is a decision on the "merits" for res judicata purposes. Cases involving dismissals without prejudice, rendered in the expectation that the claim can be considered in the future, are inapposite.

Even in an ordinary civil case, Rule 60(b) cannot be used to revive an issue intentionally omitted from the appeal. Petitioner could have appealed the District Court's decision on the default issue to the Court of Appeals and chose not to. Under *Ackermann* v. *United States*, Rule 60(b) is not available to revive the claim.

The Court of Appeals was well within its discretion to refuse to consider a claim raised for the first time in that court on petition for rehearing. There is no miscarriage of justice in this case that would warrant a departure from normal procedure. Petitioner is guilty of murder. He was an active participant, not a minor accomplice, regardless of which version of the facts is

believed. He has murdered before. Justice is long overdue in this case.

ARGUMENT

I. FRCP 60(b) does not apply to habeas cases where its effect is to evade the successive petition statute.

Petitioner's statement of the first question presented in this case is whether "every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." Brief for Petitioner i. No such stark rule is necessary to decide this case. There may be extreme circumstances not presented in this case that would call for a different result. Cf. *Calderon* v. *Thompson*, 523 U. S. 538, 557 (1998) (noting that fraud on the court might be different); *Thompson* v. *Calderon*, 151 F. 3d 918, 920, n. 3 (CA9 1998) (later proceedings in same case, noting that prosecution misconduct depriving petitioner of evidence to make the § 2244(b)(2) showing might be a ground for Rule 60(b) relief). Instead, the case can be decided on the well-established principle that the Federal Rules of Civil Procedure[3] do not apply where application would be contrary to the habeas rules or statutes or the specialized needs of habeas proceedings. In particular, Rule 60(b) cannot be used to evade the successive petition rule. The overwhelming majority of the Courts of Appeals have so held. See *Dunlap* v. *Litscher*, No. 02-1960 (CA7, Sept. 6, 2002), p. 3 (collecting cases).

A. Habeas Corpus and the Civil Rules.

Although habeas corpus is nominally a civil proceeding, that label is "gross and inexact." *Harris* v. *Nelson*, 394 U. S. 286, 293-294 (1969). "Essentially, the proceeding is unique."

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3. For brevity, we will refer to these rules as the "Civil Rules" and the Rules Governing Section 2254 Cases in the United States District Courts as the "Habeas Rules."

Id., at 294. As originally promulgated, the Civil Rules had "very limited application to habeas proceedings." *Id.*, at 295. Civil Rule 81(a)(2) simply continued the application of civil rules to habeas proceedings to the extent they had been applied before the promulgation of the rules, but not further. *Id.*, at 294. To the extent the Civil Rules introduced procedural innovations, such as broad discovery, they did not apply to habeas. See *id.*, at 295. The *Harris* Court also noted "the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems." *Id.*, at 296. Discovery as it exists in federal civil litigation was unsuited, because it would "do violence to the efficient and effective administration of the Great Writ." *Id.*, at 297. Habeas Rule 11 is "intended to conform with the Supreme Court's approach in the *Harris* case." Advisory Committee's Notes on Habeas Rule 11, 28 U. S. C., p. 479 (2000 ed.).

Harris was applied specifically to Rule 60(b) in *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (*per curiam*). A habeas petitioner successfully obtained a new trial, but then sought to preclude a retrial. He asked the Federal District Court to change its judgment from a conditional to an unconditional writ. *Id.*, at 484-485. Under the circumstances, the basis of this claim could not be exhausted in state court until the post-trial appeal. See *id.*, at 488. The Court held that Rule 60(b) could not be used to evade the exhaustion rule. Civil Rule 81(a)(2) precluded use of the Civil Rules in a manner contrary to the habeas statutes. "Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command." *Id.*, at 489.

Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2851, p. 227 (2d ed. 1995) (cited below as "Wright & Miller"). Rule 60 was drafted with civil litigation in mind and therefore strikes that balance in the way thought appropriate for civil litigation. Criminal cases

also raise the problem of balance between finality and error correction. The factors to be considered differ, however, and so a different rule addressing those concerns has evolved for habeas corpus. That different rule is the successive petition rule.

Taken as a whole, criminal procedure tilts the finality/justice balance sharply in the defendant's favor. For the criminal defendant, exclusively among all litigants, a favorable jury verdict is absolutely final and unreviewable. No matter how clearly erroneous, an acquittal cannot be overturned. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 91 (1978). Criminal defendants alone, of all litigants, can have the lower federal courts review claims that state courts erred on federal questions. The prosecution cannot and civil litigants cannot. See, *e.g.*, *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286 (1970). Even when that review is concluded, res judicata as such does not apply to the denial of habeas relief. See *infra*, at 11.

The claim that unsuccessful habeas petitioners should be afforded relief from judgment on the same basis as civil litigants must be evaluated in this context. The entire proceeding is an additional layer of review no other litigant receives, and the judgment from which relief is sought is not res judicata.

The direct effect of a judgment denying habeas relief is merely to leave the status quo intact. There is nothing to relieve. The prisoner remains in prison under the original judgment of conviction, not the judgment denying habeas. The need for relief only arises from the indirect effects. A second petition is subject to the limits of 28 U. S. C. § 2244(b). In addition, because the statute of limitations is not tolled during the pending of the first federal petition, see *Duncan* v. *Walker*, 533 U. S. 167, 181-182 (2001), the second petition might be time-barred. Congress has considered those possibilities and made its decision as to the appropriate balance. Exceptions for newly discovered facts, see 28 U. S. C. § 2244(b)(2)(B)(i); § 2244(d)(1)(D), retroactive new rules, see § 2244(b)(2)(A) and

(d)(1)(C), state-created impediments, see § 2244(d)(1)(B), and actual innocence, see § 2244(b)(2)(B)(ii), are built into the statute where and to the extent Congress thought them appropriate.

In the *Thompson* case, both this Court and the Ninth Circuit noted possible extreme cases where the state would have no legitimate expectation of finality. A party who procured a judgment by fraud upon the court would not have a legitimate judgment, *Calderon* v. *Thompson*, 523 U. S., at 557, and hence no entitlement to the finality of a judgment. Where the petitioner cannot meet the exceptions to the statutory rule because the state's misconduct prevents him from doing so, that misconduct could conceivably estop the state from asserting the bar. See *Thompson* v. *Calderon*, 151 F. 3d, at 921, n. 3. Such rare circumstances can be addressed when and if they arise. The present case is a routine request to relitigate based on new legal authority. Nothing in petitioner's Rule 60(b) argument would confine use of the rule to any narrow subset of habeas cases. To hold that Rule 60(b) is generally applicable to habeas cases, or to the large class of cases where at least one claim was denied on the basis of default, would be to create a second, broad set of exceptions in addition to the narrow ones Congress decided upon when the issue was squarely before it. That is precisely what *Harris*, *Pitchess*, Civil Rule 81(a)(2), and Habeas Rule 11 forbid.

B. The Successive Petition Rule.

The rule on consideration of a second petition after denial of the first has evolved from unlimited allowance at common law to prohibition with only narrow exceptions under 28 U. S. C. § 2244(b). This evolution has been a response to other changes in the law of habeas corpus.

At common law, the denial of habeas relief had no preclusive effect at all, and the petitioner could apply to a different judge for *de novo* reconsideration. See *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). This rule was needed because there was

no appellate review of the denial. See *ibid.* The rule was not a burden because of the extremely narrow scope of issues which could be considered on habeas. "As applied to criminal cases, habeas corpus was a pretrial remedy. . . . After conviction, the writ was not available to attack judgments of courts of competent jurisdiction." Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928 (1998) (footnotes omitted). The rule that denial of habeas was not res judicata presented no threat whatever to the finality of convictions, because the judgment of conviction itself *was* res judicata. See *id.*, at 930; *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830).

Both the unreviewability of habeas decisions and the narrow scope of habeas issues are long gone, and the wide-open allowance of successive petitions is gone with them. Denial of federal habeas relief is reviewable by appeal to the court of appeals, 28 U. S. C. § 2253, rehearing en banc in that court, Fed. Rule App. Proc. 35, and certiorari in this Court. See 28 U. S. C. § 1254. The scope of issues now includes almost all constitutional questions, the only exception being the Fourth Amendment exclusionary rule. See, *e.g.*, *Withrow* v. *Williams*, 507 U. S. 680 (1993) (declining to extend rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda* claim). Constitutional claims, furthermore, have been vastly expanded beyond the basic requirements of fundamental fairness. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens, J., dissenting). In capital cases, enormous amounts of time and money go into litigating alleged noncompliance with a complex and constantly changing web of rules governing the discretionary sentencing decision, rules having nothing whatever to do with guilt or eligibility for the death sentence. There is no limit to the number of such challenges creative lawyers could bring if allowed to do so, and hence without a successive petition rule capital sentences could never be carried out.

From the early twentieth century through the Antiterrorism and Effective Death Penalty Act of 1996, the law of habeas

corpus evolved in the direction of greater finality, although not without " 'some backing and filling.' " Cf. *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (plurality opinion) (quoting *Fay* v. *Noia*, 372 U. S. 391, 411-412 (1963)). *Salinger* v. *Loisel*, 265 U. S. 224 (1924) was the first recognition of the rule in this Court. While rejecting the government's argument that a prior denial was res judicata, see *id.*, at 230, the Court held, "Among the matters which may be considered, and even given controlling weight, are . . . (b) a prior refusal to discharge on a like application." *Id.*, at 231. This was a very broad discretionary rule with no firm criteria for application. The Court indicated it would have affirmed if the District Court had denied relief on this basis, but it proceeded to the merits because the District Court had done so. *Id.*, at 232. Either resolution was proper.

When Congress enacted a new judiciary code, it included § 2244 on finality of determination. The original section was the same as the present subdivision (a), except that it applied to both state and federal prisoners. See 28 U. S. C. § 2244 (1964 ed.). In keeping with *Salinger*, the rule was discretionary. See S. Rep. No. 1559, 80th Cong., 2d Sess., 9 (1948). At the same time this bill was moving through Congress, this Court decided *Price* v. *Johnston*, 334 U. S. 266 (1948). *Price* limited *Salinger* to the situation "when a later *habeas corpus* application raising the same issues is considered." *Id.*, at 289. That is, *Price* distinguished the "successive" application in the narrow sense from the "abuse of the writ" defense.

Sanders v. *United States*, 373 U. S. 1 (1963) was the final chapter of "a trilogy of 'guideline' decisions" on habeas corpus. *Id.*, at 23 (Harlan, J., dissenting). "The over-all effect of this trilogy . . . [was] to relegate to a back seat . . . the principle that there must be some end to litigation." *Ibid.* *Sanders* sharply limited the *Salinger* rule regarding successive applications.

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior

application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15 (footnote omitted).

In Sanders' case, his prior application had been denied for stating "only bald legal conclusions with no supporting factual allegations." *Id.*, at 19. Denial of the petition based on this defect in pleading without giving the petitioner an opportunity to amend was not considered a disposition on the merits. *Ibid.*

Congress soon acted to reduce successive petitions. The problem was not the number of cases in which relief was being granted but rather the burdens of the litigation. See H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5 (1966); S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). In addition, Congress found "disconcerting . . . the delays in executing State court sentences in capital cases as a result of habeas corpus applications seeking review of State court action . . . ." H. R. Rep. No. 1892, *supra*, at 5. Various proposals were considered to deal with this problem. See *id.*, at 5-6. One that survived in the final bill was "to add to section 2244 . . . provisions for a qualified application of res judicata." *Id.*, at 8. Subdivision (b) was added to provide that "after an evidentiary hearing on the merits of a factual issue, or after a hearing on the merits of an issue of law . . . a subsequent application . . . need not be entertained" unless based on a new ground which was not deliberately withheld or otherwise abusive.

Despite the clear intent of Congress to change the law in the direction of greater finality, see S. Rep. No. 1797, *supra*, at 2, it was another 20 years before this Court reexamined *Sanders*. Unfortunately, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) has no majority on the successive petition question. The plurality opinion reviews the history of the 1966 amendment. *Id.*, at 448-452. It then weighs the prisoner's interest in the "fundamental justice of his incarceration" versus the state's interest in finality. *Id.*, at 452-453. The plurality adopted Judge Friendly's "colorable claim of innocence" requirement for successive

petitions. *Id.*, at 454. "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Id.*, at 444, n. 6. Five years later, *McCleskey* v. *Zant* reexamined the abuse-of-the-writ aspect of *Sanders* and adopted the cause-and-prejudice test for second petitions with claims omitted from the first. See 499 U. S., at 490.

In 1996, Congress decided that *Kuhlmann* and *McCleskey* had not gone far enough in restricting repeated rounds of habeas litigation. Just as in 1966, the concern was not with excessive grants of relief, but rather with the burden and especially the delay from the multiple rounds of litigation. In one notorious case, the *McCleskey* rule had not been clear enough to prevent the issuance of a stay of execution to entertain a *fifth* federal challenge to a death sentence on an obviously defaulted claim. See *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.* (*Harris*), 503 U. S. 653, 653-654 (1992) (*per curiam*). Senator Hatch cited the *Andrews* case, which took 18 years and 30 appeals. See 141 Cong. Rec. 15,062, col. 2 (1995). That case took almost three years on the second round of federal habeas. See *Andrews* v. *Deland*, 943 F. 2d 1162, 1168 (CA10 1991) (petition filed July 19, 1989), cert. denied, 502 U. S. 1110 (1992), rehearing denied, 503 U. S. 967 (March 30, 1992). This was in a case involving "no question of Andrews' participation in the crimes," 943 F. 2d, at 1186, an almost unbelievably horrific case of sadistic torture and multiple murder. See *State* v. *Pierre*, 572 P. 2d 1338, 1343-1344 (Utah 1977).

To preclude more than one round of federal review in all but the rarest cases, Congress clamped down hard on "second or successive" habeas corpus applications in its revision of § 2244(b). See *Tyler* v. *Cain*, 533 U. S. 656, 661-662 (2001). Subdivision (1) forbids without exception claims "presented in a prior application," *i.e.*, what has traditionally been called a "successive" petition. Subdivision (2) applies to claims "not presented in a prior application," *i.e.*, the "abuse of the writ" scenario. Only two narrow exceptions are allowed: (1) retroactive new rules; and (2) newly discovered facts *and* actual

innocence. The references to the "merits" in former subdivision (b) are not present in the new subdivision.

Congress's intent to *preclude* the second round of litigation, not merely to enable the state to *prevail* in that round, is further implemented by the extraordinary procedural measures in subdivision (b)(3). Subdivision (b)(3)(A) requires leave of the court of appeals to even file the petition, and subdivision (b)(3)(B) requires that decision to be made by a three-judge panel. This is to preclude shopping for a single judge to authorize filing and grant a stay. Subdivision (b)(3)(D) requires a decision in 30 days, and (b)(3)(E) forbids rehearing or certiorari review of that decision. The clear purpose here is that, in nearly all cases, the attempt to begin a second or subsequent round of federal review will be over in 30 days. In most capital cases, the state should be able to set an execution date the month following final disposition of the first federal habeas petition.

The intent of Congress would be subverted if the limits on successive habeas petitions could be circumvented merely by invoking a different procedural device. Twice this Court has rebuffed such attempts. In *Gomez*, the habeas petitioner withheld his challenge to the use of cyanide gas until the eve of execution and then filed the claim as a civil rights action under 42 U. S. C. § 1983. See 503 U. S., at 653. "This action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991) to bar this successive claim for relief." *Ibid.* The Court held that Harris had made no showing of cause, *ibid.*, impliedly holding that the *McCleskey* standard applied.

Calderon v. *Thompson*, 523 U. S. 538 (1998) is similar. "Thompson filed a motion with the Court of Appeals to recall its mandate denying habeas relief." *Id.*, at 546. He also filed a Rule 60(b) motion in the District Court. See *id.*, at 547. An en banc panel of the Court of Appeals recalled the mandate. It "asserted it did not recall the mandate on the basis of Thompson's later motion for recall, but did so *sua sponte* on the basis

of the claims and evidence presented in Thompson's first federal habeas petition." *Id.*, at 548.

Regarding recalls of habeas mandates in response to a petitioner's motion, the *Thompson* Court said,

> "In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). *If the court grants such a motion, its action is subject to AEDPA* irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply)." *Id.*, at 553 (emphasis added).

This statement is *dictum*, since the Court went on to hold that the *sua sponte* recall on the original petition was not subject to § 2244(b). See *id.*, at 554. Even so, it is an important statement of principle, and one on which the Court appeared to be unanimous. See *id.*, at 569, n. 1 (Souter, J., dissenting).

Gomez and *Thompson* are applications of the more general principle that when Congress has provided a specific procedure for the resolution of particular controversies and placed limitations on it, those limitations cannot be evaded simply by choosing a different and more general procedure. Even though a challenge to the fact or duration of custody by state officers may fall within the broad language of the civil rights remedy statute, 42 U. S. C. § 1983, it cannot be used in lieu of habeas for such a challenge. See *Spencer* v. *Kemna*, 523 U. S. 1, 20 (1998) (Souter, J., concurring). Despite the broad wording of the All Writs Act, it cannot be used when another "statute specifically addresses the particular issue at hand . . . ." *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985).

The successive petition rule is a "modified res judicata rule," well within the power of Congress to enact. See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Courts can weigh the competing interests of habeas petitioners and the state in the absence of a statute or in construing a vague statute, as this Court did in *Sanders*, *Kuhlmann*, and *McCleskey*, see *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996), but the balance struck judicially is always subject to legislative revision. Congress has deliberately moved the mark, and the wisdom of its choice is not for courts to decide. See *id.*, at 328. Neither is the statute a mere inconvenience to be evaded.

Congress meant to give habeas petitioners one round of federal review, *i.e.*, decision by the district court, appeal to the court of appeals, and certiorari to this Court. The end of that first round was meant to be the end in all but the rarest cases, with a highly expedited process for determining whether a case was one of the rare ones. A holding that Rule 60(b) is generally available would destroy this system. Even if nearly all Rule 60(b) motions are denied, unless they are subject to the requirements of § 2244(b) the litigation of them will become the second round of review that Congress meant to prevent.

II. The successive petition rule applies to this case.

Petitioner Abdur'Rahman filed his motion under Rule 60(b) to relitigate an issue already decided against him in a final judgment of the District Court.[4] This is generally the kind of relitigation the successive petition rule, now codified and strengthened in 28 U. S. C. § 2244(b)(1), was intended to

4. More precisely, the District Court's decision was "final" in the sense that term is used in 28 U. S. C. §§ 1291 and 2253(a) and Civil Rule 60(b), as opposed to the sense of completion of all proceedings on appeal. The case was final in the District Court because the District Court had entered its judgment disposing of the case, rather than an interlocutory order.

prevent. This case presents two variations on the standard theme that require discussion. The motion was filed before the mandate issued, and the District Court's ruling was based on procedural default.

A. The Appellate Mandate.

Petitioner notes that at the time he filed his Rule 60(b) motion the Court of Appeals had not issued its mandate, although it had decided the case and this Court had denied certiorari. See Brief for Petitioner 6-7. However, exhaustion of all appellate review has never been a defining characteristic of a successive petition. For example, in the notorious *Harris* case, Harris filed his second petition while the appeal from denial of the first was pending in the Court of Appeals. See *Harris* v. *Pulley*, 885 F. 2d 1354, 1358 (CA9 1989). Habeas Rule 9(b), governing "second or successive petition[s]," still applied. See *id.*, at 1369-1371, 1380 (applying rule, although finding it did not bar the claims).

If a second petition filed while the first is on appeal was understood to be a "second or successive petition" under Rule 9(b) before AEDPA, a similar petition must certainly be understood to fall within the meaning of the identical language under Congress's toughened standard. At the very least, "second or successive petition" should be understood to include any petition filed after the District Court renders its "final order," within the meaning of 28 U. S. C. § 2253(a), and which seeks to litigate an issue which was or could have been included in the previous petition.[5]

5. The questions of when an amendment to the first petition while it is still pending in the District Court may be subject to limitation under 28 U. S. C. § 2244(b)(2) or (d) should be considered in a case which actually presents those questions.

B. Successive Petitions and Defaulted Claims.

Petitioner argues that the successive petition rule does not apply, because it is limited to cases where the first petition was decided on the "merits," while his nondisclosure claim was "presented but unadjudicated in the original application." Brief for Petitioner 31.

This Court has on occasion referred to a successive petition as one which "raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 444, n. 6 (1986) (plurality opinion). It does not follow, however, that this shorthand description refers to "the merits" in the narrow sense that petitioner uses the term. In its narrowest sense, the "merits" of a habeas case refers to the petitioner's underlying claim, without regard to procedural default, exhaustion, retroactivity, statute of limitations, or any other requirement. In a broader sense, though, the "merits" of a § 2254 case can be decided on any ground which resolves the only question that statute authorizes a federal court to answer—whether the petitioner is entitled to the relief he seeks. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 958-960 (1998). For example, if the habeas court decides that the rule the petitioner seeks would not apply retroactively to his case even if decided in his favor, the court must deny relief on that basis without reaching the underlying question. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389-390 (1994). Similarly, under AEDPA, if a habeas court decides that the petitioner is in custody pursuant to the judgment of a state court which recognized the correct rule of law and reasonably applied it to the facts of the case, it must deny relief. See 28 U. S. C. § 2254(d)(1). This is a final decision that the petitioner is not entitled to relief, and it is a decision on the "merits" of the petition in the pertinent sense.

Slack v. *McDaniel*, 529 U. S. 473 (2000) and *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998) are consistent with this view of the merits. In both of those cases, the decision on the first petition was that the federal court could not grant relief

on the claim *yet*. In procedural default cases, the decision is that the federal court cannot grant relief on the claim *at all*. Petitioner claims the distinction between the two "lacks substance." Brief for Petitioner 33. On the contrary, the difference goes to the heart of the rationale of both decisions.

Slack addressed a petition dismissed as unexhausted. The dismissal rule is premised on the understanding "that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U. S., at 486. There is no such premise for defaulted claims. A defaulted claim is defaulted precisely because the state remedy is no longer available, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 855 (1999) (Stevens, J., dissenting), and no "return" to federal court is in the cards.

Martinez-Villareal is similar. Dismissal of a claim as premature, like dismissal for nonexhaustion, means the federal court cannot reach the underlying claim at that time. See 523 U. S., at 644-645 (comparing exhaustion). The distinction here is analogous to the distinction in res judicata cases, because the successive petition rule is " 'a modified res judicata rule.' " *Id.*, at 645 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996)).

Even in civil litigation, this issue does not arise often, but it was discussed and decided in *Angel* v. *Bullington*, 330 U. S. 183 (1947). In that case, a decision of the North Carolina Supreme Court that the claim was barred was held to be res judicata in a subsequent suit in federal court.

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State.

* * *

> "The 'merits' of a claim are disposed of when it is refused enforcement. . . . [T]he 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of *res judicata*." *Id.*, at 190.

When a court has decided, in the second round of litigation, that a prior judgment is or is not res judicata, that decision may itself be res judicata and preclude reopening the preclusion question in a third round. See *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 525 (1986). Similarly, under the successive petition rule, a prior decision that a claim is procedurally defaulted generally precludes reopening the default question.

In the present case, the District Court decided the default question in accordance with the precedent in effect at the time of the decision and at the time of the default. See J. A. 53 (citing *Silverburg* v. *Evitts*, 993 F. 2d 124, 126 (CA6 1993)). If petitioner believed that decision was erroneous or wished to argue for a change in the law, that path was open via appeal. See *Angel*, 330 U. S., at 189. Since Congress has provided appellate review, successive petitions can no longer be used as a substitute. Cf. *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). The successive petition rule applies to this case and forbids reopening the issue in the District Court. Rule 60(b) cannot be used to evade the finality that Congress chose to impose.

III. Even in regular civil cases, Rule 60(b) is not available to revive issues omitted from the appeal.

The present case "is not an ordinary case . . . , because [petitioner] seeks relief from a criminal judgment entered in state court." *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998). Such a case involves "more than ordinary concerns of finality . . . ." *Ibid.* Even in an ordinary civil case, however, Civil Rule 60(b) is not available to revive an issue omitted from the appeal.

Civil litigants occasionally try to use Rule 60(b) to ask the district court to correct allegedly erroneous rulings of law. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2858, p. 293 (2d ed. 1995). When the motion is made after the time to appeal has run, relief is almost invariably denied. See *id.*, at 296-298.

Ackermann v. *United States*, 340 U. S. 193 (1950) addressed this issue not long after the adoption of the Civil Rules. Ackermann decided not to appeal a judgment canceling his naturalization, due to the cost. See *id.*, at 195-196. A codefendant did appeal and obtained a reversal and dismissal. *Id.*, at 195. Even though the outcome in Ackermann's case was "probably wrong," *id.*, at 198, he was not entitled to relief under Rule 60(b). "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ibid.* For procedural default purposes, there is no distinction between omission of a particular issue and failure to appeal at all. See *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991).

Ackermann is on point. Petitioner cross-appealed from the District Court's decision, but not on the ground now asserted. This was a deliberate choice. Petitioner wished to reserve his limited appellate brief pages for the claims he apparently thought were better. See Brief for Petitioner 4; Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings, J. A. 155. There is nothing wrong with that choice. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones* v. *Barnes*, 463 U. S. 745 (1983)). Counsel need not and should not "raise[ ] every colorable issue." *Jones*, 463 U. S., at 753. The consequence of the choice is that the arguments left on the cutting room floor are abandoned and cannot be raised later, except in unusual circumstances. See *Smith*, 477 U. S., at 534; cf. *id.*, at 537-538 (exception for fundamental miscarriage of justice).

Petitioner's contention that he did everything required at every stage of the proceedings to preserve his misconduct claim, see Brief for Petitioner 27, is not correct. He omitted the claim twice, on application for leave to appeal to the Tennessee Supreme Court and again on appeal to the Sixth Circuit. See Brief for Petitioner 3-4. At both of these times, the law gave him clear notice that the omission constituted abandonment of the claim.

The Sixth Circuit's original decision on appeal does not address the claims at issue here because they were not briefed. The first mention of those claims in the Sixth Circuit was in a motion filed after this Court denied certiorari. See Brief for Petitioner 6; J. A. 152, 155. That court stated in its order denying leave to file a second habeas petition, ". . . the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." J. A. 37. The Court of Appeals reiterated that statement in conjunction with its denial of rehearing. J. A. 39.

Although the Court of Appeals could have been more explicit, this statement indicates that the change in Tennessee rules argued by petitioner could not revive his claim abandoned on the federal appeal, even if it really did reach back to revive claims previously defaulted in state court. Regardless of whether the District Court's ruling on procedural default was correct, the Court of Appeals' decision rests on the alternate, independent ground that petitioner did not appeal the default ruling.

As this Court has noted a number of times, procedural rules and finality sometimes " 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982)). If this were a case of injustice, the Sixth Circuit might well have bent the rules and reinstated petitioner's belated claim. But this is not such a case. The District Court thoroughly reviewed and rejected petitioner's "actual innocence" claim. See J. A. 63-68. The District Court

noted in particular that "Petitioner conveniently overlook[s] the fact that [he] admitted that he was guilty at the sentencing phase of the trial." J. A. 65. Not only is he clearly guilty of murder in the present case, but he has murdered before. See *State* v. *Jones*, 789 S. W. 2d 545, 552 (Tenn. 1990).

Under these circumstances, the Court of Appeals was well within its discretion to refuse to consider a claim omitted from the original appeal. Rule 60(b) cannot be used to evade this rule, just as it cannot be used to evade the habeas successive petition rule.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be affirmed.

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Respectfully submitted,

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